2014 WL 7202477 (Ga.App.) (Appellate Brief)
Court of Appeals of Georgia.

Kenneth D. MORNAY, Sr., et al., Appellants,

v.

NATONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., Appellee.

No. A14A2307.
September 2, 2014.

Appeal from the State Court of Fulton County Case No. 13EV018002 A

Brief of Appellant

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***1 PART ONE: STATEMENT OF THE CASE**

I. Procedural History

After Sylvia Mornay died from the injuries she suffered while a passenger in a van dispatched by Appellee Southeastrans, Inc. (“Southeastrans”), Appellants Kenneth D. Mornay, Sharon Bright, and Karen Ann Thomas filed a complaint in the State Court of Fulton County against Southeastrans, National Union Fire Ins. Co. of Pittsburgh, P.A. (“National Union”), Admiral Insurance Company (“Admiral”), Doe Corporation No's 1-5 and John Doe No's 1-5. V1 7-23.

On January 17, 2014, National Union filed its motion for summary judgment. V17 3863.

After a hearing, the trial court granted National Union's motion for summary judgment in an order dated and entered April 28, 2014. V17 5520.

On May 28, 2014, Appellants timely filed and served their notice of appeal to the Court of Appeals of Georgia from the trial court's order. V1 2.

II. Relevant Material Facts [1]

***2 A. The incident that killed Sylvia Mornay.**

On April 19, 2010, Appellee Southeastrans, Inc. ("Southeastrans") dispatched a bus operated by Drop-4-Care Transportation, one of its designated "transportation providers," to pick up Sylvia Mornay from her nursing home and take her to a doctor's appointment. V1 13-14. While loading Ms. Mornay and her wheelchair into the 2002 Ford E-350, the driver failed to secure Ms. Mornay to her wheelchair or the wheelchair to the bus. V1 14-15. Because she did not keep a proper lookout or maintain proper control of the bus, the driver had to apply the brakes suddenly and without warning, causing Ms. Mornay to be violently thrown to the floor of the vehicle. V1 15. Ms. Mornay sustained serious injuries that ultimately led to her death. VI 15.

B. The 2002 Ford E-350 Bus was designed to transport more than 10 passengers.

The bus in which Ms. Mornay was being transported is a 2002 Ford Econoline E350 Super Duty designed to seat at least twelve passengers: "[two ***3** i]ndividual front seats, two 3-passengers bench seats, one 4-passenger bench seat." V1 14; V14 4400, 4444, 4449.

C. The 2002 Ford E-350 Bus is offered for a variety of transportation services other than transportation to and from receiving medical care or prescription medication.

At the time of the accident, the 2002 Ford E-350 bus was owned and operated by Drop-4-Care Transportation, V14 4585, 4589, which offered a range of non-medical services for which the bus could be used. V14 4585, 4589-4591. The corporate representative for Drop-4-Care admitted that the bus could be used for non-medical services such as transport to and from "church/synagogue," "family outings," "funerals," a "night in town," "social outings," and "shopping." V14 4588-4590:73-75.

The corporate representative for Southeastrans admitted that transporting someone to a family outing, to go shopping, or to a location other than a treating provider's office would not be considered medical transportation. V15 4958:70.

***4 D. The 2002 Ford E-350 Bus was used to transport persons other than the elderly or disabled.**

Not only was the 2002 Ford E-350 available for more than just medical transportation, but it was also available to transport persons other than just the **elderly** or disabled. The terms of the contract between Southeastrans and the Georgia Department of Community Health ("DCH") require Southeastrans to transport younger passengers under the PeachCare Program. V13 4265. Under the terms of the contract at Para. H(2) between Southeastrans and Drop-4-Care, Drop-4-Care is to "require the use of DOT approved child safety seats for all occupants six (6) years of age and younger":

2. Provider shall require the proper use of seatelts and shoulder restraints by all front seat occupants, including the driver. Rear seabelts shall be visible, available and functional for use by all rear seat occupants. Provider shall require the use of DOT approved child safety seats for all occupants six (6) years of age and younger.

V14 4362. Pursuant to Paragraph E(4) of the agreement, all of Drop-4-Care vehicles, including the 2002 Ford E-350, "must utilize child safety seats when transporting children age six (6) years of age or younger:"

4. Each vehicle must have functional, clean and accessible seatbelts for each passenger seat position and shall be stored off the floor when not in use. Each vehicle must utilize child safety seats when transporting children age six (6) years of age or

younger. Each vehicle shall have at least two (2) seatbelt extensions available. Additionally, each vehicle shall be equipped with at least one (1) seatbelt cutter, mounted above the driver's door for use in emergency situations.

V14 4359.

***5 E. The Appellees**

Operating under an exclusive contract with the DCH, Southeastrans arranges the transportation of all Medicaid members in its territory, as well as some PeachCare members. V13 4264, 4265. The goal of the contract between DCH and Southeastrans "is to provide transportation services for qualified Medicaid members who need to secure necessary health care and have no other reasonable means of transportation." V13 4265. Southeastrans contracts with "transportation providers" like Drop-4-Care to transport these passengers. V14 4357. These "transportation providers" must conform to a variety of Southeastrans' requirements, including the use of DOT approved child safety seats for all passengers six years old and younger and the assistance of all passengers, including children, in being secured within the vehicles used to transport them. V14 4359 ¶ E4; 4361 ¶ G12; 4362 ¶ H2.

Admiral Insurance Company issued a policy of liability insurance which insured Southeastrans for its operation as a motor common or motor contract carrier of passengers, effective May 6, 2009. V1 12. It was made a party pursuant to the direct action statute, O.C.G.A. § 40-1-112. V1 9, 13.

***6** National Union issued a policy of liability insurance which insured Southeastrans for its operation as a motor common or motor contract carrier of passengers, effective October 15, 2009. V1 12. It was made a party pursuant to the direct action statute, O.C.G.A. § 40-1-112. VI 8-9, 12.

III. Method By Which the Enumerations of Errors Were Preserved for Consideration on Appeal

The Enumerations of Error were preserved by Appellants' notice of appeal timely filed on May 28, 2014. V1 2.

PART TWO: ENUMERATION OF ERRORS

1. The trial court erred in granting National Union's motion for summary judgment and in finding as a matter of law that the 2002 Ford E-350 was used exclusively to transport the **elderly** or disabled to and from receiving medical care or prescription medication as required under the exemption to the Motor Carrier Statute where the evidence shows that the 2002 Ford E-350 was offered for non medical services and was used to transport persons other than the **elderly** or disabled.

2. The trial court erred in granting National Union's motion for summary judgment and in finding as a matter of law that the 2002 Ford E-350 is not capable ***7** of transporting more than 10 persons for hire as required under the exemption to the Motor Carrier Statute where the evidence, the rules of statutory construction, and the guidance provided by the Georgia Department of Public Safety show that the Ford Bus has the attribute of and was designed to transport more than 10 passengers.

PART THREE: ARGUMENT

A. Standard of Review

A de novo standard of review applies to an appeal from a grant of summary judgment, and this Court must review the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. *Burkett v. Liberty Mut. Fire Ins. Co.*, 278 Ga. App. 681, 682, 629 S.E.2d 558 (2006). In reviewing a trial court's ruling on a legal question, this Court owes **no** deference to the trial court. *Suarez v. Halbert*, 246 Ga. App. 822, 824 (1), 543 S.E.2d 733 (2000) (emphasis added).

Appellate judges should not take summary judgment lightly, for what is at stake is of constitutional magnitude. *Bbb Serv. Co. v. Glass*, 228 Ga. App. 423, 425, 491 S.E.2d 870 (1997). As this Court has long held:

> ***8** When a trial court or appellate court determines that summary judgment or directed verdict is appropriate, it is in effect a determination that a party is not entitled to his or her right to a trial by jury even after a demand for jury trial has been made. *See* Ga. Const of 1983, Art. I, Sec. I, Par. XI; O.C.G.A. § 9-11-38.

Id. (citing *Serv. Merch v. Jackson*, 221 Ga. App. 897, 899, 473 S.E.2d 209 (1996)). Thus, the granting of summary judgment "is a very, very grave matter. By such act, the case is taken away from the jury, and the court substitutes its own judgment for the combined judgment of the [jury]." *Serv. Merch.*, 221 Ga. App. at 898 (citing *Johnson v. Curenton*, 127 Ga. App. 687, 688, 195 S.E.2d 279 (1972)).

B. Where the Terms of the Direct Action Statute Require Strict Compliance, the Trial Court Erred in Holding that National Union Met Its Burden of Proof to Show That the Statutory Exemption Applies to Its Insured Southeastrans Where the 2002 Ford E-350 Was Not Used Exclusively For Medical Services And Was Not Used Exclusively To Transport The Elderly Or Disabled.

***9** The trial court erred in holding that National Union is not subject to Georgia's direct action statute, which allows plaintiffs to directly sue the insurers of motor carriers. *See* O.C.G.A. § 40-1-112. The direct action statute provides that "[i]t shall be permissible under this part for any person having a cause of action arising under this part to join in the same action the motor carrier and the insurance carrier, whether arising in tort or contract." O.C.G.A. § 40-1-112(c). "Since the direct action statute is in derogation of common law, its terms require strict compliance." *Occidental Fire and Cas. Co. of North Carolina, Inc. v. Johnson*, 302 Ga. App. 677, 677, 691 S.E.2d 589 (2010).

Based on its cursory review of the record, the trial court erroneously held that National Union was not subject to direct suit because its insured Southeastrans falls within the statutory exemption to a "motor carrier:"

> Vehicles, owned or operated by the federal or state government or by any agency, instrumentality, or political subdivision of the federal or state government, or privately owned and operated for profit or not for profit, capable of transporting not more than ten persons for hire when such vehicles are used exclusively to transport persons who are ***10** **elderly**, disabled, en route to receive medical care or prescription medication, or returning after receiving medical care or prescription medication.

O.C.G.A. § 40-1-100(12)(B)(vii). As used in the exemption above, **elderly** and disabled passengers are defined as:

> individuals over the age of 60 years or who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, are unable to utilize mass transportation facilities as effectively as persons who are not so affected.

O.C.G.A. § 40-1-100(12)(B)(v).

The burden of proof "lies with the party claiming it, and there is no burden on the opposing party to prove that the motor vehicle is not within the exemption." Occidental Fire, 302 Ga. App. at 678 (internal punctuation omitted). Because National Union has the burden of proof, it "cannot merely rely upon the absence of evidence in the record disproving that the exemption applies." Id. at 678-679 (internal citations omitted).

***11** Further, courts **narrowly construe** these statutory exemptions. *Georgia Cas. & Sur. Co. v. Jernigan*, 166 Ga. App. 872, 305 S.E.2d 611 (1983). Exemptions are subject to certain rules of statutory construction and are to be "strictly construed against" the entity seeking exemption. *Jarrard v. Clarendon Nat. Ins. Co.*, 267 Ga. App. 594, 595, 600 S.E.2d 689 (2004).

1. The trial court erred in finding that National Union met its burden to show that Southeastrans falls within the exemption to the Motor Carrier Statute where the 2002 Ford E-350 was not used exclusively to transport the elderly or disabled to and from receiving medical care or prescription medication.

In its order, the trial court erroneously found as a matter of law that the 2002 Ford E-350 "was used exclusively to transport individuals enumerated in the statute, and is, therefore, covered within the statutory exemption." V17 5520. To make its determination, the trial court relied heavily upon the deposition testimony of Samuel Maddy, the owner of Drop-4-Care. V17 5520. Despite noting that Maddy admitted Drop-4-Care offered services outside of the exemption, the trial court erroneously held that this was irrelevant because "[t]he statute makes no mention of a vehicle being offered for other purposes." V17 5520. Rather, the trial ***12** court found Maddy's testimony that his company never actually "provided transportation outside the statutory exemption" was enough to meet National Union's burden of showing that the 2002 Ford E-350 was exclusively engaged in the transportation of the elderly or disabled. V17 5520.

a) By its plain language, the statutory exemption does not include those vehicles which offer services outside of the exemption.

The statutory exemption, by its plain terms, conclusively refutes the trial court's interpretation that the use of the 2002 Ford E-350 for services outside of the exemption is not contemplated by the statute. "[D]efined words shall have the meanings specified, unless the context in which the word or term is used clearly requires that a different meaning be used." O.C.G.A. § 1-3-2. When construing statutes, the Georgia Supreme Court has held that:

> we apply the fundamental rules of statutory construction that require us to construe the statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage. At the same time, we must seek to effectuate the intent of the legislature.

***13** *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 187, 674 S.E.2d 894 (2009) (citation and punctuation omitted).

The word "exclusively" modifies "used" in the text of the exemption: "when such vehicles are used exclusively to transport" the elderly or disabled "en route to receive medical care or prescription medication, or returning after receiving medical care of prescription medication." O.C.G.A. § 40-1-100(12)(B)(vii) (emphasis added). In the context of exemptions to the Motor Carrier Act, this Court has held that "exclusively" means "only; solely... to the exclusion of all others... in a manner to exclude." Occidental Fire, 302 Ga. App. at 679. By being admittedly offered for non-medical transportation services like shopping, family outings, going to church, going out for a night in town, going to a funeral, the 2002 Ford E-350 was not being used "only" or "solely" to transport the elderly or disabled to and from "receiv[ing] medical care or prescription medication," to the exclusion of all other services, or in a manner to exclude all other services. V14 4589-4591:73-75. Indeed, the corporate representative for National Union's insured Southeastrans admitted that using the 2002 Ford E-350 for transportation to go shopping or to go on a family outing or to go to any location other than a treating provider's office is "not considered to be medical transport." V15 4958:70. ***14** Where the terms of the statutory exemption require strict compliance and must be narrowly construed because it is in derogation of common law, the offering of the 2002 Ford E-350 for non-medical services falls outside of the statutory exemption. *See Occidental Fire*, 302 Ga. App. at 677. National Union thus fails to satisfy its burden of showing that the 2002 Ford E-350 was used exclusively to transport the elderly or disabled to and from receiving medical care or prescription medication.

b) Where the evidence in the record shows that the 2002 Ford E-350 was used to transport persons other than the elderly or disabled, the use of the 2002 Ford E-350 does not meet the terms of the plain language of the statutory exemption.

The plain language of the statutory exemption states that the 2002 Ford E-350 must be "used **exclusively** to transport persons **who are elderly, disabled...**" O.C.G.A. § 40-1-100(12)(B)(vii) (emphasis added). However, contrary to the trial court's findings which relied heavily on the testimony of Drop-4-Care's owner, the evidence in the record shows that the 2002 Ford E-350 was not used exclusively to transport persons who are **elderly** or disabled. As evidenced by the terms of its contract with Southeastrans, Drop-4-Care was contractually obligated to have the ability to transport children where its vehicles were required to use DOT approved ***15** child safety seats when transporting children six years old and younger and its drivers were required to assist in securing children in the vehicles. V14 4359 ¶ E4; 4361 ¶ G12; 4362 ¶ H2. This comports with Southeastrans' obligation to transport younger passengers involved in the PeachCare Program pursuant to the terms of Southeastrans' contract with DCH. V13 4265. By being under a contractual obligation to transfer children, the 2002 Ford E-350 was thus not being used "only" or "solely" to transport the **elderly** or disabled, to the exclusion of all other persons, or in a manner to exclude all other persons. *Occidental Fire,* 302 Ga. App. at 679. The use of the 2002 Ford E-350 thus did not strictly comply with the terms of the statutory exemption.

This Court has repeatedly held that it is not just the use of the motor vehicle on the date of the incident that governs whether the statutory exemption applies, it is the use of the motor vehicle at any time up to and including the date of the incident. *See Jernigan,* 166 Ga. App. at 875 ("if at any time up to and including the time of the collision with appellees, any of the requirements for the exemption had not been met as to the pulpwood truck, that motor vehicle would not have been engaged 'exclusively' in the transportation of exempted products and would not qualify Oconee for the exemption from 'motor contract carrier' status"); ***16** *Jarrard,* 267 Ga. App. at 596 (evidence of what the insured was hauling on the day of the accident failed to meet the burden of showing that the insured vehicle was used exclusively to transport exempt products); *Smith v. Commercial Transp.,* 220 Ga. App. 866, 868-869, 470 S.E.2d 446 (1996) (evidence that truck was hauling an exempt product on the day of the accident was insufficient to show that it was used exclusively for that purpose). By being used to transport children in the weeks leading up to the incident which killed Ms. Mornay, the 2002 Ford E-350 was thus not being used "exclusively, i.e., "only" or "solely," to transport the **elderly** or disabled and would not qualify National Union's insured Southeastrans for the exemption from "motor carrier" status.

Construing the evidence and all reasonable conclusions and inferences drawn from it in the light most favorable to the Appellants, the rules of statutory construction and the evidence show that the 2002 Ford E-350 was not used exclusively for medical services and was not used exclusively to transport the **elderly** or disabled. Because National Union's insured's motor vehicle (the 2002 Ford E-350) was thus not used exclusively to transport the **elderly** or disabled to and from receiving medical care or prescription medications, National Union failed ***17** to meet its burden of showing that its insured carrier fell within the cited exemption such that it was not subject to liability under the direct action statute.

C. Where the Terms of the Direct Action Statute Require Strict Compliance, the Trial Court Erred in Holding that National Union Met Its Burden of Proof to Show That the Statutory Exemption Applies to Its Insured Southeastrans Where the 2002 Ford E-350 Was Designed to Transport More Than 10 Passengers.

In its order, the trial court erroneously held that the exemption does not consider whether the 2002 Ford E-350 bus was "designed to carry more than 10 people" but only contemplates "actual capacity [of the vehicle] at the time in question." V17 5520. However, this does not comport with either the plain language of the statutory exemption or established case law.

1. By its plain language, the statutory exemption refutes the trial court's holding that the original design of the 2002 Ford E-350 should not be considered when applying the statutory exemption.

Applying the fundamental rules of statutory construction, the plain language of the statutory exemption demonstrates that the trial court erred in holding that the original design of the 2002 Ford E-350 should not be considered. The pertinent ***18** phrase of the statutory exemption provides that the 2002 Ford E-350 must be "capable of transporting not more than ten persons for hire..." The word "capable" is defined as "having attributes (as physical or mental power) required for performance or accomplishment." http://www.m-w.com/dictionary/capable. Giving the word "capable" its "plain and ordinary meaning" in the statutory construction of the exemption, *see Currid,* 285 Ga. at 187, the 2002 Ford E-350 must have had the attribute of being able to transport **no more** than 10 passengers **at any time up to** the date of Ms. Mornay's incident in order to fall within the exemption. **But the evidence in the record shows otherwise.** The evidence in the record shows that the 2002 Ford E-350 was designed to seat at least twelve passengers. V1 14; V14 4400, 4444, 4449. Where the 2002 Ford E-350 had the attribute of being able to transport more than 10 passengers at the time it was produced, the 2002 Ford E-350 was **capable** of transporting more than ten persons for hire and thus does not strictly comply with the terms of the statutory exemption.

2. The case law does not support the trial court's holding that the 2002 Ford E-350's actual capacity at the time of the incident determines whether the statutory exemption applies.

***19** When determining whether the statutory exemption applies, this Court has held that the applicable time period is "at any time up to and including the time of the incident: **"if at any time up to and including the time of the collision** with appellees, **any of the requirements** for the exemption had not been met as to the [motor vehicle in question]..." *Jernigan,* 166 Ga. App. at 875 (emphasis added); *Jarrard,* 267 Ga. App. at 595. Thus, if at any time up to and including the date of the incident that killed Ms. Mornay, the 2002 Ford E-350 had the attribute of carrying more than 10 passengers, then the 2002 Ford E-350 was capable of transporting more than 10 persons for hire and would thus disqualify Southeastrans from the statutory exemption. *See Jernigan,* 166 Ga. App. at 875.

That has happened here. As the evidence shows, the 2002 Ford E-350 was designed to carry more than 10 passengers, having been produced to seat at least twelve passengers. V1 14; V14 4400, 4444, 4449. The 2002 Ford E-350 thus was capable of transporting more than 10 persons for hire at one point in time. Where the terms of the exemption require strict compliance and must be narrowly construed because it is in derogation of common law, the fact that the 2002 Ford E-350 was capable of transporting more than 10 persons for hire at one point in time falls outside of the statutory exemption. *See Occidental Fire,* 302 Ga. App. at 677. ***20** National Union thus fails to satisfy its burden of showing that the 2002 Ford E-350 was "capable of transporting **not** more than ten persons for hire."

3. The Georgia Department of Public Safety's adoption of the Federal Motor Carrier Safety Regulations further refutes the trial court's holding that the 2002 Ford E-350's actual capacity at the time of the incident determines whether the statutory exemption applies.

Georgia has formally adopted the motor carrier safety regulations issued by the Federal Motor Carrier Safety Administration ("FMCSA"). See Tunali v. State, 311 Ga. App. 844, 846, 717 S.E.2d 341 (2011). Pursuant to the Georgia Motor Carrier Act of 2012, the Department of Public Safety ("DPS") "shall promulgate such rules and regulations as are necessary to effectuate and administer" the Act, and the courts "shall take judicial notice of all rules and regulations promulgated by" the DPS. O.C.G.A. § 40-1-54(a) and (c). The motor carrier safety rules and regulations promulgated by the DPS "are **the same** as the Motor Carrier Safety Regulations issued by the [FMCSA] contained in Title 49 of the Code of Federal Regulations, Parts 350, 365, 376, 382, 383, 385, 386, 387, and 390 through 397." *See* Georgia Dep't of Public Safety Transp. Rulebook, R 1-1 (a), available at ***21** *https:// dps.georgia.gov/sites/dps.georgia.gov/files/imported/vgn/images/portal/city 1210/6/32/52465205Chapter_1_DPS_Transportation_Rules.pdf* (emphasis added).

In pertinent part, DPS Rule 1-387, entitled "Minimum Levels of Financial Responsibility for Motor Carriers," provides that "the balance of Rule 1-387 is contained in... Title 49 CFR Part 387." DPS Rulebook, R 1-387. Under the guidance issued by

the FMCSA for Title 49 CFR Part 387, the level of financial responsibility required for a passenger carrier is determined by the "manufacturer's designed seating capacity" rather than the number of passengers riding in the vehicle at a particular time:
Question 2: What determines the level of coverage required for a passenger carrier: the number of passengers or the number of seats in the vehicle?

Guidance: The level of financial responsibility required is predicated upon the manufacturer's designed seating capacity, not on the number of passengers riding in the vehicle at a particular time.

See 49 CFR § 387.27, Guidance, http:// www.fmcsa.dot.gov/regulations/title49/section/387.27?guidance

***22** Such guidance by the FMCSA, which has been adopted by the DPS and of which Georgia courts are required to take judicial notice, serves to highlight the error in the trial court's ruling that "actual capacity [of the vehicle] at the time in question" determines whether the statutory exemption applies. V17 5520. It is not "actual capacity at the time in question" but rather "designed seating capacity" that determines whether the statutory exemption applies. Otherwise, commercial vehicles like the 2002 Ford E-350 Bus could simply be modified to fall within the statutory exemption and thus allow entities like Southeastrans, which should otherwise be regulated, escape liability for their wrongdoing.

D. The Intent of the Legislature in Passing the Motor Carrier Act Further Bolsters Appellants' Argument That the Trial Court Erred in Holding That the Statutory Exemption Applies in This Matter.

The Georgia Supreme Court has held that when construing the terms of a statute, courts "must seek to effectuate the intent of the legislature." *Currid*, 285 Ga. at 187. The purpose of the direct action statute is to further the policy of the Motor Carrier Act, which is "to protect the public against injuries caused by the motor carrier's negligence." *Occidental Fire*, 302 Ga. App. at 677-78. Thus, when ***23** construing exemptions to the Motor Carrier Act, this Court has held that deference must be given to the Legislature's intent to protect the public:

> We are guided by rules of statutory construction, give deference to the policy of the Motor Carrier Act of protecting the public against injuries caused by the motor carrier's negligence, and recognize the import of the carrier's insurance policy.

Occidental Fire, 302 Ga. App. at 681. Further, when the General Assembly revised and re-passed the Motor Carrier Act in 2012, it specifically noted that "the for-hire transportation of persons and property are a privilege that require close regulation and control to protect public welfare, provide for a competitive business environment, and provide for consumer protection." O.C.G.A. § 40-1-51.

Such public policy behind the Motor Carrier Act only serves to bolster Appellants' argument that the trial court erred in applying the statutory exemption to Southeastrans. As Southeastrans admits, it is an entity that provides for-hire transportation of all Medicaid members in its territory through an exclusive contract with the DCH, with the goal of providing "transportation services for qualified Medicaid members who need to secure necessary health care and **have *24 no other reasonable means of transportation.**" V13 4265. It cannot have been the intent of the Legislature to allow an entity like Southeastrans who is providing transportation to low-income members of the public with no other transportation options to escape liability for its negligence by simply modifying any vehicles designed to carry more than 10 passengers to fall within the exemption. An entity like Southeastrans providing transportation services to underserved members of the public should not be allowed to take advantage of the system and wield the statutory exemption as a shield against any wrongdoing it commits against these members of the public. Indeed, the Georgia Supreme Court has held that:

> the primary purpose of requiring a bond, policy of insurance or other security as a condition to the operation of public service motor vehicles for hire is for the protection of the public, **by assuring those who are**

> **injured, in person or property, through the negligent operation of such vehicles, compensation for the injuries or damages sustained.**

Miller v. Harco Nat. Ins. Co., 274 Ga. 387, 390-391, 552 S.E.2d 848 (2001) (internal citations omitted) (emphasis added). Thus, where the purpose of the ***25** direct action statute is to "protect the public against injuries caused by the motor carrier's negligence," then it is **of key importance** that the application of an exemption from such purpose to an entity like Southeastrans who is providing transportation to Medicaid members who have no other options **should be strictly construed.** Yet the trial court failed to do so in its order, ignoring the evidence in the record, the rules of statutory construction, and the heavy burden that National Union must meet.

E. Conclusion

This Court, citing to Chief Justice Bleckley of the Georgia Supreme Court, has held that:

> Truth is often dim, but is truth nevertheless. Frequently amongst the facts best proved is one which no witness has mentioned in his testimony, such fact being an inference from other facts. From this perspective, it is preferable not to have a single trial judge stand in the shoes of the several men and women of various backgrounds who make up a jury and determine what inferences they may draw from the evidence. It is for this ***26** reason that trial judges should grant a motion for summary judgment or directed verdict **only where the evidence is truly clear, palpable and undisputed.**

Serv. Merch., 221 Ga. App. at 898-899 (internal citations and quotations omitted) (emphasis added). There was no such "truly clear, palpable and undisputed" evidence here.

Rather, the evidence in the record shows that the trial court summarily dismissed, or ignored entirely, evidence that raises material questions of fact which preclude summary judgment for National Union. The evidence in the record presents a genuine issue of material fact as to whether National Care met its burden of proof to show that the statutory exemption applies to its insured Southeastrans where the 2002 Ford E-350 was not used exclusively for medical services and was not used exclusively to transport the **elderly** or disabled. The evidence in the record further raises a genuine issue of material fact as to whether National Union met its burden of proof to show that the statutory exemption applies to its insured Southeastrans where the 2002 Ford E-350 was designed to transport more than 10 passengers. Finally, the intent of the General Assembly in passing the Motor ***27** Carrier Act to protect the public serves to bolster Appellants' argument that the trial court erred in applying the statutory exemption to Southeastrans.

Accordingly, the order of the trial court granting National Union's motion for summary judgment should be reversed given the evidence in the record, a narrow application of and strict compliance with the terms of the statutory exemption, public policy, and other arguments set forth above.

Footnotes

1 Appellants currently have several pending Motions to Supplement the Record in the court below. Appellants anticipate filing a Motion to File a Supplemental Brief solely for the purpose of adding those additional citations once the record is supplemented.

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